Zeitschrift des Max-Planck-Instituts für europäische Rechtsgeschichte
Journal of the Max Planck Institute for European Legal History

Rechts Rg geschichte

Rechtsgeschichte
Legal History

www.rg.mpg.de

http://www.rg-rechtsgeschichte.de/rg24
Zitiervorschlag: Rechtsgeschichte – Legal History Rg 24 (2016)
http://dx.doi.org/10.12946/rg24/302-313

Rg 24 2016 302 – 313

Rodrigo Míguez Núñez

Indigenous Customary Law in a Civil Law Context: Latin America and the Chilean Case

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Abstract

Based on anthropological and historical considerations, this paper analyses the evolution of the relationship between Western law and aboriginal custom in Latin America by focusing on the most tangible and problematic issue in customary law: land tenure. My aim is to provide a critical review of the impact of the rule of law in the arrangement of the alternative cosmologies that flows from the material and spiritual relationship of indigenous groups with their lands. Historical and political issues will be emphasised to illustrate the current problems concerning the interaction between custom and formal law in the case of the Mapuche people from Chile. By looking at some recent developments in the arena of public law, indigenous legislation and legal doctrine, the paper finally suggests how private law discourse, which traditionally has paid almost no attention to the discussion of indigenous law, might be integrated into the legal systems that widely recognise indigenous customs.

Rodrigo Míguez Núñez*

Indigenous Customary Law in a Civil Law Context: Latin America and the Chilean Case

1 Introduction

It is impossible to encompass the vast historical discourse on indigenous customary law in Latin America within the scope of this paper for two reasons. First, there is no clear theory on Latin American customary practices, nor is there a systematic body of legal sources that permits the systematic analysis of indigenous customary law. Second, the cultural diversity of the indigenous groups that live in these territories is vast. This difficulty was foreseen by the most outstanding jurist of Indian law, the Spaniard Juan Solórzano Pereira, who, in the middle of the 17th century, asserted that »the customs of each region are as diverse as the air that surrounds them and the boundaries that divide them«.[1] It is clear, therefore, that any attempt to generalise customs in the Latin American context is highly risky.

In order to avoid such complexities, my aim is to outline the main legal milestones in the evolution of the relationship between Western law and indigenous customary law in Latin America by concentrating on the case of the Mapuche, a group of indigenous people settled in south-central Chile and southwestern Argentina (including parts of present day Patagonia).

The aim of this essay is mainly descriptive. I first briefly outline the notion of custom in the Latin American indigenous context to provide a general theoretical framework. I then explain the historical background of the relationship between Western law and aboriginal custom in Latin America. I finally analyse the Chilean case with regards to its Mapuche inhabitants, concluding with some observations. Historical and political issues will be emphasised to illustrate the current problems concerning the interaction between custom and formal law. I endeavour to provide a comparative and critical review of the impact of the rule of law in the arrangement of indigenous customs in Latin America.

2 Custom in an aboriginal legal context

It is evident that in the Western world, ethnography, cultural studies and history have contributed to our understanding of custom. This is particularly true in studies of indigenous contexts. Briefly, such studies have illustrated the relevance of land, spirituality and the reciprocity of the social relationship in the indigenous people's cosmology. As a result, the infusion of law with spirituality and cultural practices could be seen as a common element for aboriginal groups. In this sacred world, the law that regulates social relations could only be described as a »legal divine tradition«.[2]

The above conceptualisation of the aboriginal legal system is especially pronounced in the case of Latin American indigenous groups. For instance, the relationship between man and the land in the highlands of the central Andes (Peru, Bolivia and northern Chile and Argentina) displays the symbolic or mystical nature of the natives' perception of the world as the main characteristic of the legal tradition. This notion presupposes a particularly close relationship with nature, a vision of the cosmos in which all physical activity is invariably bound together with the spiritual world. Notably, we are dealing here with a *holistic* notion of the relationship with nature, since the whole of the land tenure system cannot be explained with reference to its individual parts alone. That is, we cannot

* Associate Professor of Private Law University of Eastern Piedmont. This paper expands on a lecture delivered at the Workshop »Legal History in Action: Writing Down Indigenous Customs«, Academia Sinica: Institutum Iurisprudentiae, Taipei, 7 May 2015.

1 Solórzano Pereira (1736 [1647]) II, XXV, 9.

2 Glenn (2000) 68.

explain the existence of man without the land, and vice versa.[3]

The same applies when looking at the Mapuche people. For instance, the contemporary Mapuche man finds himself dealing simultaneously with two incompatible notions of land rights. One of them is a legacy of the Western conquest, as is the word »property« itself, which has no equivalent in the aboriginal language. The other is holism, as just described regarding the notion of customary law in indigenous context. In this perspective dances, prayers and ceremonies in honour of the Earth at seed times and harvest reflect the sacred bond between man and the land.[4]

It should be noted that this approach to the aboriginal legal system is not exclusive to ethnohistoric and anthropological circles. The Inter-American Court of Human Rights since 2001 has consistently affirmed that »for indigenous communities, relations with the land are not merely a matter of possession and production but a material and spiritual element which they must fully enjoy, even to preserve their cultural legacy and transmit it to future generations«.[5] On that basis the Court has affirmed that »The protection of the communal ownership of indigenous peoples must take into account that the Land is closely related to their oral traditions and expressions, customs and languages, arts and rituals, knowledge and practices concerning nature, culinary arts, customary law, clothing, philosophy and values«.[6] Notably then, by proclaiming that indigenous communal land rights stem from »ancestral use or occupancy«, not from any act of the State, the Inter-American Court of Human Rights has created an alternative conception of indigenous rights based on their customs.[7]

It is relevant that the notion of customary law, especially in traditional societies, is constantly changing. Moreover, the diversity of a customary legal regime makes it impossible to seek a universal definition for customary law for all times and contexts. Yet, following a recent systematisation, some similarities for most of the Latin American indigenous legal traditions emerge: a) communal and collective aspects of ownership or free / open sharing of resources; b) a mix of (reciprocal) rights and responsibilities grounded in a spiritual value system; and c) a central ethical understanding that resources must be used in a way that is productive and beneficial to all members, including future generations (solidarity / brotherhood and eco-centric ethics).[8]

3 Customary law in the Latin American context: some historical remarks

3.1 The pre-Colombian and colonial era

As the legal historian Fernando Suárez pointed out, to »talk about indigenous customs is to talk about pre-Colombian law, because in primitive societies, and especially in the Indies, custom is the Law«.[9] Similarly, Bederman asserts that, »presumably all law in preliterate culture is custom«.[10] In fact, before Spanish colonisation custom was the *real* law, and legislation or statute law was just a concept taken from Roman law and imposed.[11] Each indigenous group had their own rules, and those were customary rules. In this context, immemorial rules can be considered a dynamic process rather than a strictly defined and static set of rules. It is a process that evolves from a »way of life« of the people combined with precedents applying to special cases. It is also important to note that, although some pictographic writing among native groups, such as the Aztecs, was evident, the oral tradition, by definition unwritten, was abided and accepted by generations in the indigenous cultures of Latin America.

3 Vasapollo (2011) 51. For a more detailed account of this relationship in the Andean worldview, see: Míguez Núñez (2013a) 113 f.

4 For more on the Mapuche's beliefs and symbolism, see Chihuailaf (1999). Generally, on the legal assumptions of the man-land relationship in Mapuche society see Levaggi (2004) 105–108.

5 IACtHR Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua. Merits, Reparations and Costs. Judgement of August 31, 2001. Series C No. 79 § 149; IACtHR Case Sawhoyamaxa Community v. Paraguay. Merits, Reparations and Costs. Judgement of March 29, 2006. Series C No. 146 § 131.

6 IACtHR Case Yakye Axa Community v. Paraguay. Merits, Reparations and Costs. Judgement of June 17, 2005. Series C No. 125 § 154. For more on this, see: McHugh (2011) 234 f.

7 See: Indigenous and tribal people's rights over their ancestral lands and natural resources: Norms and jurisprudence of the Inter-American human rights system, OEA/Ser.L/V/II. Doc. 56/09, 30 December 2009, Para. 68. See also Tobin (2014) 108.

8 Tobin (2014) 31.

9 Suárez (1995–1996) 119.

10 Bederman (2010) 13.

11 Suárez (1995–1996) 127.

Evidently, this assertion complicates the knowledge of customs in terms of the sources of pre-Colombian and colonial law. Briefly, the record of indigenous customs in this period is based on information collected by the first Spanish authorities, in the form of judicial records, court cases related to land, and so on, or descriptions incorporated in the chronicles written by Indians (Guamán Poma), mestizos (Garcilaso) or Spanish »indianised« intellectuals (Juan de Betanzos).[12] The colonial analysis of indigenous customs was usually limited to particular cases or geographical areas, which explains why studies of the legal phenomena of customary law during Spanish rule are still fragmented. Scholars, in fact, examine customs as a chapter in general works on Latin American legal history. As a result, studies treating customary indigenous law are still uncommon and exceptional.[13] It is, therefore, quite proper to reiterate an assertion Rafael Altamira made in 1948: »it can be said that in respect of legislation and indigenous customary practice which have become part of colonial Indian law, everything is still to be done«.[14]

In addition to this first theoretical gap, it should be stressed that jurists in the colonial period did not construct an organic explanation of indigenous custom as a source of law. Only recently have the forerunners of the modern study of colonial law suggested that indigenous custom had the same value as the *fueros* in Castilian law, occupying the second position in the order of the sources of law, just below the special Castilian legislation enforced in the Indies.[15]

But notably, whatever position indigenous custom may have had in the Spanish legal system, from the time of *Leyes Nuevas* (1542–1543) indigenous customs received special treatment within the formal legislation, coexisting with it in a pluralistic legal scheme. As usually happens in the context of legal transplantation, norms based on foreign models interact with pre-existing local arrangements, accommodating, as Twining underlines, the institutionalised normative orders composed by bodies of social norms and practices.[16] It is interesting to note that, in the Latin American experience, this phenomenon resulted from a doctrine (propounded by pre-eminent intellectuals such as José de Acosta, Bartolomé de las Casas, Alonso de Zorita and Juan Polo de Ondegardo) that demanded the inclusion of indigenous groups into the socio-legal colonial system, allowing them to preserve their ancient legal organisation in matters where custom did not contravene Spanish Crown legislation and Christian principles.[17] Hence, an important aspect of colonial legislation was the adaptation of Castilian law and institutions to the customs present in the New World, and thus, multiple social and legal normative orders related to each other and interacted during the period of Spanish rule.[18]

To ensure that indigenous customary law conformed to the rational Christian model and Castilian law, colonial authorities, including judges, ministers, theologians, jurists and visitors, undertook a concise analysis of indigenous customary practices. Ethnographic notes and the direct testimony of indigenous people were fundamental tools for that purpose. This analysis permitted toleration of a relatively large number of usages, even those considered »clumsy«. Nevertheless, the final aim of this policy was to bring about the gradual extinction of aboriginal customs by means of their Christianisation. Remarkably, this was the doctrine supported by the most important commentator on Indian law, Juan Solórzano Pereira (1575–1655).[19]

It is notable that, among the indigenous customs allowed, ranging from the tax system, *mita*, procedural law and, albeit decreasingly penal, marriage and inheritance law, the recognition of indigenous communities' land rights was also included. The creation of indigenous towns legitimised the traditional land tenure rights of many

12 See Basadre (1956) 202.
13 For a general review of this assumption, see Tau Anzoátegui (2000) 45 f.
14 Altamira (1948) 120. See also González de San Segundo (1995).
15 See, for instance, the classical study of Manzano Manzano (1967) 70. On the character of custom as a »ius proprium« see Barrientos Grandón (2000) 352.
16 See Twining (2010) 515, 516.
17 Gongora (1951) 198 f.
18 On the reciprocal influence of pre-Hispanic and Castilian law during colonial times, see Mariluz Urquijo (1973) and González de San Segundo (1983).
19 For a general review of this position, see Tau Anzoátegui (2000) 73.

indigenous communities in the eyes of Western law. The Spaniards, in fact, recognised officially that indigenous people *had a right* according to European legal doctrine to use community lands in the form of *reducciones*, *pueblos de indios*, *congregaciones* and so on. Nonetheless, indigenous groups received only a right of possession, not a property right to the land, since in colonial times reductions were considered mere holders of usage or usufructuary rights on lands belonging to the Crown.[20]

By the end of the 17th century the *Recopilación de leyes de los Reynos de las Indias* (Compilation of the Laws of the Kingdoms of the Indies, 1680) established a general law for all the Indies by generalising norms that, in their origins, were addressed to local towns. The Laws of the Indies represented the rationalist aspiration among intellectual legal circles of the 17th century of building a unique and definite legal tool. As far as custom was concerned, the Laws of the Indies did recognise custom as a source of law by admitting a wide range of indigenous usages.[21] This represents a significant milestone in the positivisation of custom in Latin America. However, since the written law held higher status, there was a common understanding among Indian commentators about the limited role of custom in Spanish Crown Law. Thus, by the end of the 17th century Indian legal intellectuals had already identified written law as the main source of their legal system.[22]

3.2 The republican era

Although the application of indigenous customs became more rigid, legal pluralism remained a prominent feature of the colonial legal system until the end. However, this arrangement was to change drastically with the advent of Latin American independence. Three legal milestones developed during republican times help to understand that change: the codification of private law (mainly carried out in the 19th century); the influence of Kelsen's legal positivism; and the introduction of *indigenismo* and *indianismo* in the legal discourse, both of which occurred in the 20th century.

But if it is true that indigenous customs surpassed colonial law, de facto penetrating the normative system during a greater part of the republican period, the question arises how it was possible in a context dominated by written law and legal positivism. Only by explaining the interaction between these three legal milestones does an answer emerge.

3.2.1 The codification of private law

Since the second half of the 18th century, a legal theory arose that considered the law to be a rational creation. The entire legal system was reduced to the enactment of a set of organic, coherent and clearly written laws. In this scenario, custom was considered a mere relic of an earlier period of legal evolution. Accordingly, legal pluralism or »normativism«, developed during colonial times, was confronted with the idea of rationalism, which involved the notion of »monism«.

Furthermore, with the enactment of the Laws of the Indies in 1680, the ground had already been prepared for the process codifying private law. So in a context dominated by the so-called »culture of the code«,[23] custom was simply written out of the civil code as a source of law.

Civil codes, like the Chilean one, defined what should be understood as »law« (Article 1), but omitted any concept of custom superseding the Castilian legal tradition, which was mainly contained in the *Siete Partidas* of 13th century[24] and defined custom very precisely. However, this should come as no surprise, since this was the effect of a process started in Europe during the second half of the 18th century. This scheme, commonly known as »legal-centrism«, predicated the validity of custom on the recognition of written law. Although the details of this legal phenomenon, broadly clarified by European and Latin American scholars, are beyond the current discussion, the main consequence of the codification in the field of custom in Latin America deserves some attention.

Codification of civil law in America began in 1808. In that year the state of Louisiana adopted the French Civil Code. A similar method was followed in Oaxaca (1828–1829), Bolivia (1831), Costa Rica (1841), the Dominican Republic (1845) and Haiti (1816 and 1825).[25]

20 For more on this, see Díaz Rementería (1990) 120 ff.; Míguez Núñez (2013a) 119.

21 See, for instance, L. 4, tit. I, lib. II.

22 For details, see Tau Anzoátegui (2000) 140 f.

23 Tau Anzoátegui (2000) 8.

24 See 1, 2, 4.

25 For details, see Guzmán Brito (2000); Ramos Núñez (1997).

This trend of codifying private law can be understood by looking at the process of consolidating independence. For republican authorities, private law represented the most effective legal tool to achieve independence and to ensure political control; private law reform would then lead to the desired internal order within the new states.[26] In addition, it is well-known that the code represented a political instrument necessary to overcome the »legal particularism / pluralism« of the colonial period.[27] Therefore, the civil code was introduced both to strengthen national unity and to replace the old legal pluralism of colonial times with a rigorous monism.[28]

Moreover, Latin American civil codes were a vehicle to transport a version of liberal positivism, specifically *l'exégèse* of the 19th century. Consequently, the civil code helped to depict the law as a state-centric creation and to depict written law as an all-embracing solution. Accordingly, the role of other sources of law, such as customs, court decisions and legal doctrine, was barely subsidiary.

By around 1880, almost all Latin American countries had a civil code. Latin American civil codes approved in the second half of the 19th century were more original than their predecessors. For instance, the civil codes of Chile (1855) and Argentina (1869) symbolise the capacity of their redactors (Bello and Vélez-Sarsfield) to propose creative solutions to the most wide-ranging issues of civil law. Yet in the field of custom, these codes reproduced the pattern of their main source of codification: the French Civil Code.

In French codification, custom was simply not admitted as a source of law. In fact, the *Code Napoléon* omitted it. The same solution was adopted by the Peruvian Civil Code of 1852, Article 9 of which excludes custom from the sources of law. By contrast, the Chilean Civil Code admitted custom in Article 2 but only as *secundum legem*, and in doing so adopted the same solution enounced in Article 10 of the Austrian Civil Code of 1811. This narrow recognition of custom was reproduced in those countries where the Chilean Civil Code was taken as a model, including, for instance, El Salvador in 1859; Ecuador in 1861; Honduras in 1906; Uruguay in 1868; and Argentina in 1869. Further, it should be noted that custom as a »subsidiary source of the written law« was excluded from almost all Hispano-American civil codes, with the exception of those that adopted the Spanish Civil Code of 1899 (for political reasons), which include Honduras in 1899, Cuba in 1899 and Puerto Rico in 1899.[29]

What did this limited recognition of custom imply for indigenous law? What space remained in Latin American codification to accommodate indigenous custom?

The answer, at this point, is obvious. As Guzmán Brito asserts, at the time of writing their civil codes the Ibero-American countries ignored the tradition of indigenous law, which broadly integrated indigenous customs, despite indigenous peoples making up a significant part of their populations. The reason is clear: the right of the indigenous was at most a special law and, as such, had no place in a general and common law like the civil code.[30] Additionally, following Ossorio y Gallardo's *Anteproyecto* of the Bolivian Civil Code, this omission can be attributed to »the mere translation for America of the legal and political assumptions of the French Revolution, which of course did not include the presence of the Indian«.[31] Significantly then, the civil code ignored the presence of the Indio and, therefore, of their customs as it took for granted their disintegration and transformation into the model of modern citizens.[32]

3.2.2 The twentieth century: legal positivism, *indigenismo* and *indianismo*

In legal terms, the 20th century in Latin America can be described as the Kelsen century. Indeed, Kelsen's theory had a particular influence on the way lawyers and judges think about law even up to the present. Rather than provide an extended explanation of the local transplantation and transmutation of his work, my intention is to focus on one particular effect of his theory in the current context, clearly suggested by López Medina, that Kelsen's theory »served to give a new impulse to

26 See Mirow (2004) 98; Clavero (1989) 81.
27 See Guzmán Brito (2000) 219.
28 Tomás y Valiente (1989) 85; Tarello (1976) 29.
29 For a review on custom into Ibero-American codification, see Guzmán Brito (1987).
30 Guzmán Brito (1987) 254.
31 Ossorio y Gallardo (1943) 275.
32 For general review on this point, see Míguez (2015) 430–432.

the hegemony of legal positivism«.[33] Kelsen displays a formalistic concept of custom; that is to say, »in order for custom to be valid, it must be endowed as a *law-creating fact* and have some sovereign imprimatur«.[34]

This view of custom was common among private law scholars throughout the 20th century. A glaring example appears in one of the most important commentaries of the Chilean Civil Code. In his outstanding work, *Explicaciones de Derecho civil chileno y comparado*, Luis Claro Solar asserted that »in a country like Chile, where the law is the result of the constitutional powers, which exercise the sovereignty entrusted to them by the nation, the law cannot be at the same time the result of work of the community of citizens«. Therefore, he added, »written law is a source of law; custom is not«.[35] Remarkably, Chilean scholars and students continue to work on the basis of Claro Solar's assumptions.

But, on the other hand, it is also true that this view of custom was not uniform in the Latin American legal doctrine of the 20th century. An example of a contrary theory was the work of the Argentinean Manuel A. Sáez. In his *Observaciones críticas sobre el Código Civil*, which he wrote in 1883, Sáez dedicated forty pages to criticising the narrow recognition of custom stated in Article 17 of the Argentinean Civil Code.[36] This kind of effort, continued by others in Chile and Peru during the 1920s, took Darwinian and Comtean evolutionary theories into account as well as the legal-evolutionary works of Maine and D'Agguano to criticise the »ode« to written law as a perfect and unique tool of legal production. In any case, these were only marginal voices, as was true of the reception of others' anti-formalistic theories, such as those of Geny and Altamira.

For the foregoing, it would be easy to assume that the fate of indigenous customs in the 20th century was entirely tied to the State conception of law. But while this assumption holds for most Latin American legal systems, the influence of indigenous customs on formal law is more complex.

The 20th century represents the beginning of an exceptional period of recognition for indigenous law all over the world. From a general perspective, in the Latin America legal context this period is related to two different fields of study on indigenous issues based on two central concepts: *indigenismo* and *indianismo*.

The former relates to the scientific analysis of aboriginal ancestral usages and customs, some of which are still in force, largely studied by historians, legal historians, ethnographers and anthropologists. A clear example of this approach was »legal indigenism«, a movement lead by Peruvian jurists in the first part of the 20th century in a first attempt to understand the role of indigenous customary practices in the formal legal system. Significantly, the first legal recognition of indigenous communities in Peru, which was included in the 1920 and 1933 Peruvian constitutions, came as result of the pluralistic legal atmosphere that *indigenismo* had created.[37]

The latter approach on indigenous matters emerged in the second part of the 20th century. It comprised a series of political initiatives, mostly by indigenous intellectuals or supporters of indigenous causes, devised to institute a new order based on an aboriginal cosmology that rejects the political and legal rules imposed by Western culture. An example of this approach is *katarism*, a movement born in Bolivia by the end of the 1960s among Aymaras' intellectual circles with the aim of proposing a cultural and political order based on the indigenous right of self-determination.[38] It should be emphasised that *katarism* and similar indianistic movements were important social-intellectual sources for the Bolivian Constitution of 2009. In fact, this constitution, approved during the first administration of Evo Morales, was the first to recognize Bolivia as a pluri-national State, giving broad space not only to the indigenous customs but, more importantly, to their philosophical principles. Accordingly, the pluri-national State is based on the *suma qamaña*, that is, on the Aymara principle of »*vivir bien*« (to live well), which consists of the material and spiritual balance of the

33 López Medina (2004) 342, 343.
34 Bederman (2010) 41.
35 Claro Solar (1979 [1898]) 42–43.
36 See Tau Anzoátegui (1991).
37 On the implications of this movement, see Guillet (2005); Ramos Núñez (2006) 210 f.; Guevara gil (2009) 94 f; Míguez Núñez (2010).
38 See Rivera Cusicanqui (1986); Barragán (2008); Lucero (2008).

individual (knowing how to live) and in the same harmonious relationship with all forms of existence (living together).[39] The Ecuadorian Constitution of 2008 similarly recognised the quechua principle of *sumak kawsay*, »*buen vivir*« (good living) as an institutional basis for the pluri-national State. This concept derives from an ancient Andean principle of humans and nature co-existing »harmoniously«. Clearly, concepts such as holism, ecological ethics and Andean cosmology emerge as tangible values of the new institutional order.[40]

The implications for *indianismo* are then vast. Notably, in a promising scenario for social pluralism, indigenous customs, which are broadly admitted, are something more than a mere source of law; they constitute a »way of life« recognised and implemented by the State as an assertion of the Bolivian and Ecuadorian native cosmologies.

4 The Chilean case: Mapuche lands, customs and State law

Brendan Tobin has trenchantly written that »the relationship between indigenous peoples and their traditional lands is the most tangible aspect of customary law« and that »land tenure is perhaps the most problematic issue in customary law«.[41] These assertions can be easily confirmed by examining Mapuche history in the context of the Chilean Republic.

There are various reasons for studying the Mapuche case. The size of its population,[42] its particular history of resisting the imposition of Spanish rule,[43] and the particular mode of land use[44] are issues to be considered from both ethnohistorical and legal perspectives. But perhaps the most relevant is the current conflict they are engaged in with the Chilean State relating to land ownership in the Araucanía region.

The cause of this conflict can generally be traced to the annexation of Mapuche lands in Araucanía by the early Republic of Chile.[45] Indeed, the civilising programme adopted by the Chilean government in the 19th century allowed it to colonise the entire Araucanía region with Chileans and descendants of European immigrants. Some of those land titles were given or sold to the settlers by the government, while other lands were purchased from indigenous leaders.

Two central questions arise from this general background: how has the relationship between State law and customary law in Mapuche territories developed, and what problems do contemporary Chilean jurists and legal operators face regarding the recognition of indigenous land rights?

The first point to note is that the recognition of indigenous customary land law is a recent achievement in the Chilean legal tradition.

In December 1970, during the second National Congress of the Mapuche people held in Temuco, President Allende presented the preliminary draft

39 See Calestani (2013) 6 f.; Artaraz (2012).

40 See Huanacuni (2010) 15; Zaffaroni (2012).

41 Tobin (2014) 100–101.

42 The Mapuche are the largest ethnic group in Chile. In 2002, the date of the last official Chilean national census, indigenous peoples were estimated to represent 4.6 % of the total Chilean population. 692 000 were self-identified persons of indigenous origins, and Mapuche people accounted for approximately 85 % of this number. So officially 4 % of the total Chilean population, 604 000 inhabitants, self-identified as Mapuche. More current records (the national census of 2012 that is yet to be ratified) estimate that the Mapuche population is growing and constitutes approximately 10 % (about 1 500 000 inhabitants) of the Chilean population. The majority of Mapuche people (about 1 000 000) is currently settled in the south-central region of Araucanía. For statistics, see http://www.ine.cl/canales/chile_estadistico/estadisticas_sociales_culturales/etnias/etnias.php (accessed 14 April 2015).

43 In fact, because of the Arauco War, which persisted between Spaniards and the southern Mapuche people for nearly 350 years, all Chilean territory south of the Bío Bío River, with the exception of the Chiloe Archipelago, was largely freed from Western rule. For a historical account of this war, see Bengoa (2007a) 213 f.

44 The Mapuche group, in common with other aboriginal inhabitants of the Andes, set up a discontinuous system of land possession by holding lands in different ecological levels. From their origins they have been a semi-nomadic society that transversally occupied the southern Andes in current Argentina and Chile. The Mapuches' seasonal movement allows them to utilise the highlands during the summer, mainly for pasture (*veranadas*) and the lowlands or valley areas during the winter (*invernadas*). Similar patterns of transhumance are widespread in Europe as well in cases such as the Italian *uso civico*, also known as *alpeggio*, and the Swiss traditional land use known as *Alpwirtschaft*. For more on these kinds of land use, use see Rhoades / Thompson (1975); Netting (1981).

45 For an indispensable analysis of the Mapuche conflict, see: Bengoa (2007b). See also, for a complementary perspective on this question, Rodríguez Silva / Vergara Espinoza (2015).

of a new Indian Act, which was sent to Parliament in May 1971 and finally promulgated on 15 September 1972. This law marks a milestone in Chilean indigenous legislation, since, for the first time, the division of land was not the main aim of State law.[46] Indeed, from 1927 to 1961 the division of community lands was proposed as an instrument to integrate indigenous peoples into the nation or, as was indicated by Decree 266 of 20 May 1931, the division of land was considered »the only way to fully incorporate them into civilisation«.[47]

This attitude towards the indigenous people has been the common policy of every Chilean government since independence. The few allusions to the words *indio* or *indígena*, at least until 1972, were merely included to refer to the civilising mission of the State.[48] Clearly, the fictitious nation created under republican law does not fit with indigenous culture, which was »legally assimilated« into the model of the modern citizen sponsored by the liberal State.[49] On that basis, Chilean and Argentinian agrarian legislation of the second half of the 19th century promoted civilising the Indians through the acquisition of their »uncultivated« land. In doing so, the government condoned a colonisation policy that, in short, imposed a European concept of land use and the commercial notions associated with it. Theoretically speaking, the process of occupying Mapuche land involved the ancient doctrine of *terra nullius* in the typical ethnocentric sense: the indigenous peoples of the territories did not have property rights, since they were nomadic populations and did conform to the western legal doctrine of territorial acquisition.[50]

There is little doubt that, from the second half of the 19th century onwards, pressure increased to modify customs on indigenous land uses throughout Latin America. Around this time, the Chilean government militarily occupied the Araucanía region (*Pacificación de la Araucanía* 1861–1883) and subsequently introduced the notion of property as a fixed asset. The Decree of 4 December 1866 ordered the distribution of Mapuche territory, establishing a three-tiered land classification scheme that still exists to this day: indigenous, private and public. Further, the government implemented a series of measures to promote individual and State land ownership through colonisation.[51]

To civilise the Indians dispossessed by these measures, Indian towns or *reducciones* were founded, and it was not long before the semi-nomadic Mapuche people were converted to a sedentary lifestyle. This reduction of ancestral Mapuche lands was supported by a series of legal innovations. The end of the *Pacificación de la Araucanía*, for instance, settled the indigenous peoples in their new lands. In 1883, a law established the *Comisión Radicadora de Indígenas*, a public institution that granted nearly three thousand land titles, known as »*títulos de merced*«, in the south-central provinces of Arauco and Osorno between 1884 and 1929.[52] The land was then entitled, in common property, to the head of the household on behalf of the lineage he represented. For its part, the State became the absolute owner of all the remaining land from south of the Bío Bío river, in which the Mapuche people were unable to prove possession for at least a year. Such territories were considered uninhabited and available for colonisation by introducing »modern citizens« mainly of European provenance.[53]

To summarise, the Chilean legislative measures enacted in the second half of the 19th century introduced the Western concept of common property (*reducciones*) in Mapuche territories and the colonisation of the remaining land by imposing the notion of individual property. These are the two main effects of a more general and common phenomenon that exists throughout the Latin American rural landscape: the expansion of agricultural liberalism, primarily by compromising the customs of the indigenous communities.

Allende's 1970 legislation was then a brief interruption in Chilean republican legal history.

46 For more about the land reform on the Mapuche territories in this period, see: Correa Cabrera et al. (2005).

47 See Míguez Núñez (2013b) 40.

48 For a detailed study of the constitutional provisions related indigenous people in Latin America, see Clavero (2006).

49 For an indispensable analysis to this respect, see Larson (2004).

50 For more on this, see Míguez Núñez (2015) 428–430.

51 See Aylwin (1995) 19; Míguez Núñez (2013b) 28 f.

52 González Cortez (1986) 7.

53 Worthen (1998) 235.

Indeed, the division of Mapuche lands worsened under the military regime (1973–1990). Further, military legislation (Decree Laws 2568 and 2750, 1979) promoted the division of all remaining communities or *reducciones* into individual lots. The objective was to put an end to the special status of Indians and their lands by integrating them into the rules of the monistic-civil law scheme. As a consequence, almost all Mapuche communities were divided and the resulting smallholdings impoverished the rural Mapuche population, accelerating their migration to urban centres. This phenomenon would be noted in the 1992 census, which found that about 80 % of the Mapuche population was urban, while only the remaining 20 % was rural.

At present, the legal status of indigenous groups in Chile is notably different from other Latin American contexts. Following the Chilean republican tradition, the indígena simply does not appear in the 1980 Constitution.

An answer to how State law and conventional legal academia deal with indigenous customary practices is sorely lacking. But in practice, further efforts to recognise indigenous customs and their land rights have been gradually made. This occurred by means of two major legal tools.

The first one is special legislation. In order to protect, promote and develop indigenous groups, the Indigenous Act, *Ley Indígena* (n. 19.253), was introduced in 1993. This Act marked a real milestone in the Chilean legal tradition, as it was the first time the multi-ethnicity of Chilean society was officially declared. Significantly, the Indigenous Act is the first instrument to have written down indigenous customs.[54] For instance, according to the Indigenous Act, custom invoked in a trial between indigenous people belonging to the same ethnic group constitutes law, whenever it is compatible with the constitution. Consequently, any case involving custom must be accredited in court by all the means provided for by law and especially with a report of an expert from the National Indigenous Development Corporation (CONADI) at the request of the Court.[55] In addition, an Act of February 2008 (Lafkenche Law n. 20.249) creates the Marine Coastal Area of Indigenous Peoples, which aims »to protect the customary use of these spaces, in order to maintain the traditions and the use of natural resources in the hands of the communities linked to the coastline«. Accordingly, the law delegates the administration of coastal marine areas to indigenous communities or associations of them, whose members have exercised customary use of that space (art. 3, 2 e).

The second major legal instrument to recognise indigenous peoples and their land rights is the September 2008 ratification of the 169 ILO Convention. The Convention included a minimal regulatory standard that the States parties observe regarding indigenous peoples. As a result, since its entry into force in 2009, the Chilean legal system has been challenged on its implementation in various areas, mostly on issues relating to custom. The most relevant aspects of the 169 Convention are related to the right of prior consultation, which has generated abundant jurisprudence at the highest level,[56] and to the restitution of ancestral territories based on an evolutionary interpretation of the notion of property in Article 21 of the American Convention on Human Rights.[57] Consequently, the theoretical debate about the validity of aboriginal titles among the new sources of law is now remarkably open.[58]

54 Article 7 recognises the right of indigenous peoples to maintain and develop their cultural manifestations, according to Chilean morality, good customs and public order. Article 12 conceptualises the notion of »indigenous lands« by indicating among them »those who have been historically occupied by indigenous communities and of which they have current possession«. Article 18 establishes that inheritance law in community lands is subject to the custom that each ethnicity has on those matters. Indigenous customs in the field of justice are recognised in Article 54. Finally, the Act recognises some traditional organisations (such as *cacicados*, Article 61) and regulates specific institutions for various ethnic groups.

55 For more on the recognition of customary practices in Chile, see Castro / Vergara (2009).

56 See Galdámez Zelada (2013); Fuenzalida (2015).

57 See, generally, Contesse Singh (2012); Sanhueza (2013).

58 On the theoretical implications of indigenous land titles, see: Aguilar Cavallo (2005). Furthermore, the institutional collaboration of the State with private institutions in the area of collective land claims seems to be growing. An example of this is the support given by the *Fundación Instituto Indígena* to the *Mitrauken* communities (Francisco Cayul and Kuyvmentu Pewen, in the commune of Lonquimay), which culminated in August 2008 with the recovery of 2 735 hectares of *veranadas* lands from State control. For more on this, see Faundes (2011). See also http://www.territoriochile.cl/1516/article-76276.html (accessed 2 February 2015).

In light of these legal milestones, the question arises about the role and discussion of conventional private law with regard to indigenous customs. Can this issue be fruitfully investigated? Is native custom even considered?

At last, the debate seems to have started. The most recent and complete commented edition of the Chilean Civil Code, written by the legal historian Javier Barrientos Grandón, devotes considerable space to indigenous customs in relation to Article 2. Barrientos explains that indigenous custom is a »kind of custom« under Chilean law, with its own statute, distinct from custom in the civil law. Notably, these are the first words related to the indigenous matters ever written in a work devoted to the Chilean civil law.[59]

Furthermore, from a comparative perspective, the new Argentinean Civil and Commercial Code, which came into force on 1 August 2015, has also innovated in the area of private law. Although no rules concerning indigenous customs have been introduced, Article 18 recognises the land of indigenous communities in an important and unprecedented way: »indigenous communities have the right to possession and ownership of the lands traditionally occupied and those other suitable and sufficient for human development as provided by law, in accordance with the provisions of Article 75 paragraph 17 of the Constitution«. Unquestionably, this rule will encourage civil law scholars to analyse a classic institution of private law and property law from a new perspective, one that considers the history and anthropology of indigenous peoples. Accordingly, the »lands traditionally occupied« should not be considered a mere asset, but an integral part of the symbolic and spiritual environment necessary for the development of traditional culture. This represents a new legal category that will require fresh reflection from civil law scholars in order to meet the challenge of embracing the alternative legal cosmology that flows from the holistic relationship of the Mapuche groups with their land.

I am hopeful that things finally seem to be changing in my discipline.

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59 Barrientos Grandón (2013) 29.

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